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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71449; File Nos. SR-EDGA-2013-34; SR-EDGX-2013-43]

Self-Regulatory Organizations; EDGA Exchange, Inc.; EDGX Exchange, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC  
January 30, 2014.

I. Introduction

On November 29, 2013, EDGA Exchange, Inc. (“EDGA”) and EDGX Exchange, Inc. (“EDGX” and, together with EDGA, the “DE Exchanges”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed rule changes in connection with the proposed business combination (“Combination”) of their indirect parent company, Direct Edge Holdings LLC (“DE Holdings”), and BATS Global Markets, Inc., the parent company of BATS Exchange, Inc. (“BATS”) and BATS-Y Exchange, Inc. (“BYX” and, together with BATS, the “BATS Exchanges”) (the DE Exchanges and the BATS Exchanges are the “Exchanges”).<sup>4</sup> On December 9, 2013, EDGA and EDGX each filed an Amendment No. 1 to their respective proposed rule changes. The proposed rule changes, as modified by Amendment

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The Commission approved corresponding proposed rule changes submitted by the BATS Exchanges relating to the Combination. See Securities Exchange Act Release No. 71375 (January 23, 2014), 79 FR 4771 (January 29, 2014) (approving SR-BATS-2013-059 and SR-BYX-2013-039) (“BATS Exchanges Approval Order”).

No. 1, were published for comment in the Federal Register on December 17, 2013.<sup>5</sup> The Commission received no comments on the proposal. On January 29, 2014, EDGA and EDGX each filed an Amendment No. 2 to their respective proposed rule changes.<sup>6</sup> This Order approves the proposed rule changes, as modified by Amendment Nos. 1 and 2.

The Commission has reviewed carefully the proposed rule changes and finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>7</sup> In particular, the Commission finds that the proposed rule changes are consistent with Sections 6(b)(1) and (3) of the Act,<sup>8</sup> which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act, and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange, and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a

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<sup>5</sup> See Securities Exchange Act Release Nos. 71046 (December 11, 2013), 78 FR 76416 (SR-EDGA-2013-34) and 71045 (December 11, 2013) 78 FR 76480 (SR-EDGX-2013-43) (“Notices”).

<sup>6</sup> Amendment No. 2 makes technical amendments to language in the DEI Certificate of Incorporation (as defined below) and the DE Exchange Certificate of Incorporation (as defined below) based on comments from the State of Delaware, Department of State, Division of Corporations. Specifically, these comments are to: (1) Add references to certain applicable Delaware General Corporations Law sections in the DEI Certificate of Incorporation, (2) add the state and zip code for DEI’s registered office, and (3) add several introductory paragraphs describing the Delaware filing history of the DE Exchanges Certificate of Incorporation. Amendment No. 2 is not subject to notice and comment because it is a technical amendment that does not materially alter the substance of the proposed rule change or raise any novel regulatory issues.

<sup>7</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(1) and (b)(3).

member of the exchange, broker, or dealer. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>9</sup> which requires that the rules of the exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

## II. Discussion

### A. Corporate Structure

#### 1. Current Structure

DE Holdings, a Delaware limited liability company, owns 100 percent of the equity interest in Direct Edge, Inc., a Delaware corporation (“DEI”). DEI, in turn, owns 100 percent of the equity interest of each DE Exchange. In addition, DE Holdings owns 100 percent of the equity interest in Direct Edge ECN LLC d/b/a DE Route, a Delaware limited liability company and the routing broker-dealer for the DE Exchanges (“DE Route”).

As a limited liability company, ownership in DE Holdings is represented by units held by “LLC Members.” Certain of the DE Holdings LLC Members are Members<sup>10</sup> or affiliates of Members of the Exchange. International Securities Exchange Holdings, Inc. (“ISE Holdings”) is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings.<sup>11</sup> Other than ISE Holdings, the only firms beneficially owning ten

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<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> With respect to each of the DE Exchanges, the term “Member” is defined in Rule 1.5(n) of the DE Exchanges’ Rules as “any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.”

<sup>11</sup> For purposes of this Order, references to the beneficial ownership of a “firm” refers to the aggregate beneficial ownership of the firm and its affiliated entities. See Notices, supra note 5, at 76417 n.13 and 76481 n.13.

percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater, but less than ten percent of DE Holdings. Five other firms as well as various individuals each beneficially own less than five percent of DE Holdings.

BATS Global Markets, Inc., a Delaware corporation, owns 100 percent of the equity interests in two registered national securities exchanges, BATS and BYX, each a Delaware corporation. BATS Global Markets, Inc. also owns 100 percent of the equity interest in BATS Trading, Inc., a Delaware corporation (“BATS Trading”), that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each of the BATS Exchanges. Currently, BATS Global Markets, Inc. is beneficially owned primarily by a consortium of several unaffiliated firms, including Members<sup>12</sup> or affiliates of Members of the BATS Exchanges. No firm beneficially owns 20 percent or greater of BATS Global Markets, Inc., and the only firms beneficially owning ten percent or greater of BATS Global Markets, Inc. are: (1) GETCO Investments, LLC, an affiliate of KCG Holdings, Inc., (2) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (3) Strategic Investments I, Inc., an affiliate of Morgan Stanley. Seven other firms each beneficially own five percent or greater, but less than ten percent of BATS Global Markets, Inc., while seven other firms as well as various individuals each beneficially own less than five percent of BATS Global Markets, Inc.

## 2. The Combination

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<sup>12</sup> With respect to each of the BATS Exchanges, the term “Member” is defined in Rule 1.5(n) of the BATS Exchanges’ Rules as “any registered broker or dealer that has been admitted to membership in the Exchange.”

In connection with the Combination, several new entities were formed. BATS Global Markets Holdings, Inc., a Delaware corporation, is currently a wholly owned subsidiary of BATS Global Markets, Inc., and is currently a shell company with no material assets or operations. BATS Global Markets Holdings, Inc., in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation (“Blue Merger Sub”), and Delta Merger Sub LLC, a Delaware limited liability company (“Delta Merger Sub”). Each of Blue Merger Sub and Delta Merger Sub are currently shell companies with no material assets or operations.

As described in more detail below, at the closing of the Combination (“Closing”), BATS Global Markets, Inc. and DE Holdings will each become intermediate holding companies, held under a single new holding company upon the Closing. The new holding company, currently named “BATS Global Markets Holdings, Inc.,” will at that time change its name to “BATS Global Markets, Inc.” In addition, the current parent company of the BATS Exchanges, BATS Global Markets, Inc., will at that time change its name to “BATS Global Markets Holdings, Inc.” For ease of reference, this Order will refer to the current parent company of each BATS Exchange as “Current BGM” when referring to the entity prior to the Closing, and as “BGM Holdings” when referring to that entity after the Closing. The entity that will become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as “New BGM.”

At the Closing, among other things, (1) Blue Merger Sub will merge with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM (to be renamed “BGM Holdings”) will be the surviving company (the “BATS Merger”); (2) Delta Merger Sub will merge with and into DE Holdings, whereupon the separate existence of Delta

Merger Sub will cease and DE Holdings will be the surviving company (the “Direct Edge Merger”); (3) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and (4) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or any LLC Member, each LLC Member’s membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

As a result of the Combination, New BGM will own: (1) 100 percent of the equity interest in BGM Holdings (the entity previously referred to as Current BGM), and (2) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in the BATS Exchanges and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in the DE Exchanges. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

The ownership of New BGM, as the new top-level holding company for the combined businesses, will be divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are

expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater, but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.<sup>13</sup>

B. Proposed Rule Changes

Section 19(b) of the Act and Rule 19b-4 thereunder require a self-regulatory organization (“SRO”) to file proposed rule changes with the Commission. Although New BGM,<sup>14</sup> DE Holdings, and DEI are not SROs, certain provisions of their proposed certificates of incorporation and bylaws, along with other corporate documents, are rules of the exchange, if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, and must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b-4 thereunder. Accordingly, each of the DE Exchanges filed with the Commission the following

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<sup>13</sup> ISE Holdings, which will beneficially own greater than five percent, but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the New BGM Charter (as defined below), shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. See proposed New BGM Charter, Article FOURTH, para. (b)(ii). ISE Holdings’ shares of Class A Non-Voting Common Stock may convert to Voting Common Stock: (1) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (2) upon the termination of the Investor Rights Agreement; and (3) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. See proposed New BGM Charter, Article FOURTH, para. (c); and Investor Rights Agreement, Section 2.2(j).

<sup>14</sup> The DE Exchanges are filing with the Commission the New BGM Charter and New BGM Bylaws because, as noted above, after the Combination, New BGM will be the ultimate parent company of the DE Exchanges, and, as such, the New BGM Charter and New BGM Bylaws will be considered rules of the Exchange under Section 19(b)(1) of the Act.

documents, along with other corporate documents, in connection with the Combination: (1) The proposed Resolutions of the DE Holdings board of managers regarding the Combination (the “Resolutions”) making certain determinations regarding New BGM and the impact of the Combination on the DE Exchanges; (2) the proposed Amended and Restated Certificate of Incorporation of New BGM (the “New BGM Charter”);<sup>15</sup> (3) the proposed Amended and Restated Bylaws of New BGM (the “New BGM Bylaws”);<sup>16</sup> (4) the proposed Seventh Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC (the “New DE Holdings LLC Agreement”); (5) the proposed amendments to the DEI Certificate of Incorporation (the “DEI Certificate of Incorporation”); (6) the proposed amendments to the Bylaws of DEI (the “DEI Bylaws”); (7) the proposed amendments to the Certificate of Incorporation of the DE Exchanges (each, and collectively, the “DE Exchange Certificate of Incorporation”); (8) the proposed amendments to the Bylaws of the DE Exchanges (each, and collectively, the “DE Exchange Bylaws”); (9) the proposed amendments to Rule 2.3 of each of the DE Exchanges to reflect the affiliation between each DE Exchange and two additional registered national securities exchanges; (10) the proposed amendments to Rule 2.10 of each of the DE Exchanges to reflect the new affiliated entities of each DE Exchange; and (11) the proposed amendments to Rule 2.12 of each of the DE Exchanges to reflect the affiliation between the DE Exchanges and the routing broker for BATS and BYX. Each of the DE Exchanges also requested that the Commission approve the proposed indirect acquisition by an affiliate of the DE Exchanges of a Member of the DE Exchanges and the resulting affiliation

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<sup>15</sup> The DE Exchanges note that the New BGM Charter is substantially similar to the Current BGM Charter. See Notices, supra note 5, at 76420 and 76484.

<sup>16</sup> The DE Exchanges note that the New BGM Charter is substantially similar to the Current BGM Charter. See Notices, supra note 5, at 76420 and 76484.



between the DE Exchanges and the Member of the DE Exchanges, as required under Exchange Rule 2.10.<sup>17</sup>

1. Voting and Ownership Limitations

The New BGM Charter includes restrictions on the ability to own and vote shares of capital stock of New BGM.<sup>18</sup> These limitations are designed to prevent any stockholder from exercising undue control over the operation of any of the BATS Exchanges or the DE Exchanges and to assure that the BATS Exchanges, the DE Exchanges, and the Commission are able to carry out their regulatory obligations under the Act.

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<sup>17</sup> See Notices, supra note 5, at 76440 and 76504.

<sup>18</sup> These provisions are generally consistent with ownership and voting limits approved by the Commission for other SROs. See e.g., Securities Exchange Act Release Nos. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR-NYSE-2013-42, SR-NYSEMKT-2013-50 and SR-NYSEArca-2013-62) (order approving proposed transaction in which NYSE Euronext will become a wholly owned subsidiary of IntercontinentalExchange Group, Inc.) (“IntercontinentalExchange Group, Inc. Combination Order”); 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order approving registration application of BYX as a national securities exchange) (“BYX Approval Order”); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order approving registration application of EDGX Exchange, Inc. and EDGA Exchange, Inc.) (“EDGX and EDGA Approval Order”); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order approving registration of BATS as a national securities exchange) (“BATS Approval Order”); 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120) (order approving proposed combination between NYSE Group, Inc. and Euronext N.V.) (“NYSE-Euronext Merger Order”); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc.) (“NYSE Inc.-Archipelago Merger Order”); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (File No. SR-NSX-2006-03) (“NSX Demutualization Order”); 53128 (January 13, 2006), 71 FR 3550 (File No. 10-131) (order approving registration application of NASDAQ as a national securities exchange) (“NASDAQ Approval Order”); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26) (“CHX Demutualization Order”); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73) (“Phlx Demutualization Order”).

Specifically, the proposed New BGM Charter includes restrictions on the ability to vote and own shares of stock of New BGM. Under the proposed New BGM Charter: (1) No person, either alone or together with its Related Persons,<sup>19</sup> at any time may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement (other than the Investor Rights Agreement), vote or cause the voting of shares of the capital stock of New BGM or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM,<sup>20</sup> and (2) no person, either alone or together with its Related Persons, enter into any agreement, plan or other arrangement (other than the Investor Rights Agreement) with any other Person,<sup>21</sup> either alone or together with its Related Persons, under circumstances that would result in the shares of capital stock of New BGM that are subject to such agreement, plan or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan or other arrangement would be to enable any Person, either alone or together with its Related Persons, to vote, possess the right to vote or cause the voting of shares of the capital stock of New BGM that would represent more than 20 percent of said voting power (the “New BGM Voting Restrictions”).<sup>22</sup>

In addition, the New BGM Charter includes ownership restrictions that provide that: (1) No Person, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of capital stock of

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<sup>19</sup> See proposed New BGM Charter, Article FIFTH, para. (a)(ii) (defining “Related Person”). See Notices, *supra* note 5, at 76420-21 and 76484-85.

<sup>20</sup> See proposed New BGM Charter, Article FIFTH, para. (b)(i)(C).

<sup>21</sup> See *id.* at Article FIFTH, para. (a)(i) (defining “Person”).

<sup>22</sup> See *id.* at Article FIFTH, para. (b)(i)(C).

New BGM, and (2) no Member of any of the BATS Exchanges or the DE Exchanges, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of capital stock of New BGM (the “New BGM Ownership Restrictions”).<sup>23</sup>

If any stockholder purports to transfer to any person any shares that would violate the New BGM Voting Restrictions or New BGM Ownership Restrictions (“New BGM Voting and Ownership Restrictions”), then New BGM shall record on the books only that number of shares that would not violate that restriction and shall treat the remaining shares as owned by the purported transferor for all purposes.<sup>24</sup> If any stockholder of New BGM purports to vote, or grant any proxy or enter into any agreement, plan or other arrangement relating to the voting of shares that would violate the New BGM Voting and Ownership Restrictions, then New BGM shall not honor such vote, proxy, agreement, plan or other arrangement to the extent that such provisions would be violated and any shares subject to that arrangement shall not be entitled to vote to the extent of such violation.<sup>25</sup>

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<sup>23</sup> See id. at Article FIFTH, paras. (b)(i)(A) and (B). The limitations imposed by the New BGM Ownership Restrictions and New BGM Voting Restrictions shall not apply in the case of any class of stock that does not have the right to vote in the election of members of the board of directors of New BGM or on other matters that may require the approval of the holders of voting shares of New BGM (other than matters affecting the rights, preferences or privileges of said class of stock). See id. at Article FIFTH, para. (b)(ii)(A).

<sup>24</sup> See id. at Article FIFTH, para. (d).

<sup>25</sup> Id. If any stockholder purports to sell, transfer, assign, convert, pledge, or own any shares in violation of the New BGM Voting and Ownership Restrictions, then New BGM shall have the right to, and shall promptly after confirming such violation and to the extent funds are legally available, redeem the shares transferred in violation of the restriction. See id. at Article FIFTH, para. (e).

The New BGM Charter would provide that the New BGM Voting and Ownership Restrictions would apply only for so long as New BGM directly or indirectly controls a national securities exchange registered under Section 6 of the Act with the Commission.<sup>26</sup>

The New BGM board of directors may waive the New BGM Ownership Restrictions applicable to non-Member stockholders and the New BGM Voting Restrictions, if, in connection with taking such action, the board of directors adopts a resolution stating that the waiver:

- will not impair the ability of any exchange subsidiary to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder;
- is otherwise in the best interests of New BGM, its stockholders and its exchange subsidiaries; and
- will not impair the Commission’s ability to enforce the Act or the rules and regulations promulgated thereunder.<sup>27</sup>

Any such waiver would not be effective until approved by the Commission pursuant to Section 19 of the Act.<sup>28</sup> However, the New BGM board of directors cannot waive the voting and ownership limits above 20 percent for a Member of any of the BATS Exchanges or any of the

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<sup>26</sup> See id. at Article FIFTH, para. (b)(i).

<sup>27</sup> See id. at Article FIFTH, para. (b)(ii)(B). In making this determination, the BGM board of directors may impose on the Person in question and its Related Persons such conditions and restrictions that it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of the applicable exchange subsidiary. Id.

<sup>28</sup> See id. at Article FIFTH, para. (b)(ii)(B).

DE Exchanges and their Related Persons.<sup>29</sup> Further, the New BGM board of directors also cannot waive the voting and ownership limits above the 20% threshold if such person or its Related Persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act).<sup>30</sup>

Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>31</sup> A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.<sup>32</sup>

In addition, as proposed, DE Holdings will be a wholly-owned subsidiary of New BGM and the New DE Holdings LLC Agreement identifies this ownership structure.<sup>33</sup> Any changes to the New DE Holdings LLC Agreement, including any change in the provision that identifies New BGM as the sole member of DE Holdings, must be filed with and approved by the

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<sup>29</sup> See id. at Article FIFTH, paras. (b)(i)(B) and (b)(ii)(B).

<sup>30</sup> See id. at Article FIFTH, para.(b)(iii).

<sup>31</sup> See, e.g., IntercontinentalExchange Group, Inc. Combination Order; BYX Approval Order; EDGX and EDGA Approval Order; BATS Approval Order; NYSE-Euronext Merger Order; NYSE Inc.-Archipelago Merger Order; NSX Demutualization Order; NASDAQ Approval Order; CHX Demutualization Order; and Phlx Demutualization Order, supra note 18.

<sup>32</sup> See, e.g., id.

<sup>33</sup> See proposed New DE Holdings LLC Agreement (identifying New BGM as the sole LLC Member of the company).

Commission pursuant to Section 19 of the Act.<sup>34</sup> Similarly, as proposed, DEI will be a wholly owned subsidiary of DE Holdings, and in turn, each of the DE Exchanges will be a wholly-owned subsidiary of DEI. The Certificate of Incorporation of DEI identifies DE Holdings as the sole stockholder of DEI.<sup>35</sup> The Bylaws of the DE Exchanges identify DEI as the sole stockholder of the DE Exchanges.<sup>36</sup> Any changes to the DEI Certificate of Incorporation, including any change in the provision that identifies DE Holdings as the sole stockholder of DEI, must be filed with and approved by the Commission pursuant to Section 19 of the Act.<sup>37</sup> Similarly, any changes to the Bylaws of the DE Exchanges, including any change in the provision that identifies DEI as the sole stockholder of the DE Exchanges, must be filed with and approved by the Commission pursuant to Section 19 of the Act.<sup>38</sup> Further, pursuant to the New DE Holdings LLC Agreement, New BGM may not sell, assign, transfer, convey, gift, exchange or otherwise dispose of any or all of its interest in DE Holdings except pursuant to an amendment to the New DE Holdings LLC Agreement, which would not be effective until filed with and approved by the Commission under Section 19 of the Exchange Act.<sup>39</sup> Similarly, pursuant to the DE Exchange Bylaws, DEI may not transfer or assign, in whole or in part, its ownership interest in each DE Exchange.<sup>40</sup>

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<sup>34</sup> See id. at Article XII, Section 12.02(b) and 15 U.S.C. 78s(b).

<sup>35</sup> See proposed DEI Certificate of Incorporation, Article SEVENTH, para. 4.

<sup>36</sup> See proposed DE Exchange Bylaws, Article I(cc).

<sup>37</sup> See proposed DEI Certificate of Incorporation, Article SEVENTH, para.3.

<sup>38</sup> 15 U.S.C. 78s(b).

<sup>39</sup> See proposed New DE Holdings LLC Agreement, Article VII.

<sup>40</sup> See proposed DE Exchange Bylaws, Article IV, Section 7.

The Commission believes that these provisions are consistent with the Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

## 2. Jurisdiction; Books and Records; Due Regard

As described above, following the Closing, New BGM will be the sole LLC Member of DE Holdings, DE Holdings will be the sole stockholder of DEI, and DEI will be the sole stockholder of the DE Exchanges. Although New BGM, DE Holdings and DEI will not carry out any regulatory functions, their activities with respect to the operation of the DE Exchanges must be consistent with, and must not interfere with, the self-regulatory obligations of each DE Exchange. The New BGM Charter, New BGM Bylaws, New DE Holdings LLC Agreement and DEI Bylaws therefore include certain provisions that are designed to maintain the independence of the DE Exchanges<sup>41</sup> self-regulatory functions, enable the DE Exchanges to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b)<sup>42</sup> and 19(g)<sup>43</sup> of the Act, and facilitate the ability of the DE Exchanges and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>44</sup>

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<sup>41</sup> The provisions in the New BGM Holdings Charter applies to “Exchange Subsidiaries,” which is defined as any direct or indirect subsidiary of New BGM that is a registered with the Commission as a national securities exchange as provided in Section 6 of the Act. The DE Exchanges, as well as the BATS Exchanges, will be Exchange Subsidiaries upon the Closing of the Combination.

<sup>42</sup> 15 U.S.C. 78f(b).

<sup>43</sup> 15 U.S.C. 78s(g).

<sup>44</sup> See e.g., proposed New BGM Bylaws, Article XIV; proposed New DE Holdings LLC Agreement, Articles X and XI; and proposed DEI Bylaws, Article VII.

For example, under the New BGM Bylaws, New DE Holdings LLC Agreement and DEI Bylaws, for so long as New BGM, DE Holdings or DEI, as the case may be, directly or indirectly, controls either or both of the DE Exchanges, the board of directors (or sole LLC Member in the case of DE Holdings), officers, employees and agents of each of New BGM, DE Holdings and DEI, must give due regard to the preservation of independence of the self-regulatory functions of the DE Exchanges, as well as to its obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by either of the boards of directors of the DE Exchanges relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of such exchange to carry out its responsibilities under the Act.<sup>45</sup> The New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws would further require that New BGM, DE Holdings or DEI, as the case may be, comply with the United States federal securities laws and rules and regulations thereunder and shall cooperate with the Commission and each of the DE Exchanges, pursuant to and to the extent of their respective regulatory authority.<sup>46</sup> In addition, the New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws provide that the officers, directors,<sup>47</sup> employees and agents of New BGM, DE Holdings and DEI, as the case may be, by

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<sup>45</sup> See proposed New BGM Bylaws, Article XIV, Section 14.01; proposed New DE Holdings LLC Agreement, Article X, Section 10.01; and proposed DEI Bylaws Article VII, Section 7.1.

<sup>46</sup> See proposed New BGM Bylaws, Article XIV, Section 14.01; proposed New DE Holdings LLC Agreement, Article X, Section 10.02(a); and proposed DEI Bylaws, Article VII, Section 7.2.

<sup>47</sup> The Commission notes that DE Holdings does not have a board of directors. Therefore, the proposed New DE Holdings LLC Agreement does not reference directors in the provisions identified in this section. Otherwise, the DE Holdings' provisions identified in this section are substantively the same as those in the proposed New BGM Bylaws and proposed DEI Bylaws.



virtue of the acceptance of their position, shall be deemed to agree to: (1) Comply with the U.S. federal securities laws and the rules and regulations thereunder; and (2) to cooperate with the Commission and the DE Exchanges in respect of the Commission's oversight responsibilities regarding the DE Exchanges and the self-regulatory functions and responsibilities of the DE Exchanges, and New BGM, DE Holdings and DEI will take reasonable steps to cause its officers, directors, employees and agents to so cooperate.<sup>48</sup> Furthermore, New BGM, DE Holdings and DEI and their respective officers, directors, employees and agents will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each DE Exchange, as applicable, for purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder arising out of, or relating to, the activities of such exchange.<sup>49</sup>

The New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws provide that New BGM, DE Holdings, DEI and their respective officers, directors, employees and agents must submit to the Commission's jurisdiction with respect to activities relating to any of the DE Exchanges,<sup>50</sup> and, for so long as New BGM, DE Holdings, and/or DEI control, directly or indirectly, such DE Exchange, New BGM, DE Holdings and DEI, as the case may be, agree to provide the Commission and each DE Exchange with access to its books and records that are

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<sup>48</sup> See proposed New BGM Bylaws, Article XIV, Section 14.04; proposed New DE Holdings LLC Agreement, Article X, Section 10.02(a); and proposed DEI Bylaws, Article VII, Section 7.2.

<sup>49</sup> See proposed New BGM Bylaws, Article XIV, Section 14.05; proposed New DE Holdings LLC Agreement, Article X, Section 10.03(a); and proposed DEI Bylaws, Article VII, Section 7.3.

<sup>50</sup> Id.

related to the operation or administration of each DE Exchange.<sup>51</sup> In addition, to the extent they are related to the operation or administration of the DE Exchanges, the books, records, premises, officers, directors, agents, and employees of New BGM, DE Holdings and DEI shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the respective DE Exchange for purposes of, and subject to oversight pursuant to, the Act.<sup>52</sup> The New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws further provide that all books and records of New BGM, DE Holdings and DEI shall be maintained at a location within the United States.<sup>53</sup>

The New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws also provide that all books and records of each DE Exchange reflecting confidential information pertaining to the self-regulatory function of the DE Exchanges (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM, DE Holdings or DEI, as the case may be, shall not be made available other than to those officers, directors, employees and agents of New BGM, DE Holdings or DEI, as the case may be, that have a reasonable need to know the contents thereof, and shall be retained in confidence by New BGM, DE Holdings, or DEI, the members of their respective board of directors (as applicable), their officers, employees and agents, and not used

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<sup>51</sup> See proposed New BGM Bylaws, Article XIV, Section 14.03; proposed New DE Holdings LLC Agreement, Article XI, Section 11.02(b); and proposed DEI Bylaws, Article V, Section 5.8(b).

<sup>52</sup> Id.

<sup>53</sup> See proposed New BGM Bylaws, Article XIV, Section 14.03; and proposed New DE Holdings LLC Agreement, Article XI, Section 11.01(b); and proposed DEI Bylaws, Article VII, Section 7.5. See also proposed DE Exchange Bylaws, Article XI, Section 3.

for any non-regulatory purposes.<sup>54</sup> The New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws, however, specify that the New BGM Bylaws, New DE Holdings LLC Agreement, and DEI Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or the DE Exchanges to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New BGM, DE Holdings or DEI, as the case may be, to disclose such confidential information to the Commission or the DE Exchanges.<sup>55</sup>

The New BGM Charter, New DE Holdings LLC Agreement and DEI Bylaws provide that, for so long as New BGM, DE Holdings or DEI, as the case may be, controls, directly or indirectly, a registered national securities exchange, before any amendment to or repeal of any provision of the proposed New BGM Charter, New DE Holdings LLC Agreement or DEI Bylaws, as the case may be, may be effective, those changes must be submitted to the board of directors of each of the DE Exchanges, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act,<sup>56</sup> such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>57</sup> Each DE

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<sup>54</sup> See proposed New BGM Bylaws, Article XIV, Section 14.02; proposed New DE Holdings LLC Agreement, Article XI, Section 11.02(a); and DEI Bylaws, Article V, Section 5.8(a).

<sup>55</sup> See id.

<sup>56</sup> 15 U.S.C. 78s(b).

<sup>57</sup> See proposed New BGM Charter, Article TWELFTH; proposed New DE Holdings LLC Agreement, Article XII, Section 12.02(b); and proposed DEI Bylaws, Article VI, Section 6.4.

Exchange represents that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.<sup>58</sup>

The Commission finds that these provisions are consistent with the Act, and that they are intended to assist each DE Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act. The Commission also notes that, even in the absence of these provisions, under Section 20(a) of the Act,<sup>59</sup> any person with a controlling interest in any of the DE Exchanges shall be jointly and severally liable with and to the same extent that each DE Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>60</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act<sup>61</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

### 3. Change in Control

Upon the Closing of the Combination, New BGM will become the sole owner of DE Holdings. The current Limited Liability Company Operating Agreement of DE Holdings

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<sup>58</sup> See Notices, supra note 5, at 76421 and 76486.

<sup>59</sup> 15 U.S.C. 78t(a).

<sup>60</sup> 15 U.S.C. 78t(e).

<sup>61</sup> 15 U.S.C. 78u-3.

(“Current DE Holdings LLC Agreement”)<sup>62</sup> includes certain restrictions on the ability to vote and own units of DE Holdings. Specifically, the Current DE Holdings LLC Agreement provides that: (1) No Person<sup>63</sup>, either alone or together with its Related Persons,<sup>64</sup> may own, directly or indirectly, of record or beneficially, Units representing in the aggregate a Percentage Interest<sup>65</sup> of more than 40 percent of DE Holdings, and no Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, Units representing in the aggregate a Percentage Interest more than 20 percent of DE Holdings (“Current DE Holdings Ownership Limitation”), and (2) subject to an exception for ISE Holdings, no Person, either alone or together with its Related Persons, at any time, may, directly, indirectly or pursuant to any of various arrangements, vote or cause the voting of Units or give any consent or proxy with respect to Units representing a Percentage Interest more than 20 percent of DE Holdings (“Current DE Holdings Voting Limitation”).<sup>66</sup>

The Current DE Holdings Operating Agreement also provides that the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation may be waived

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<sup>62</sup> DE Holdings currently operates pursuant to the Sixth DE Holdings LLC Agreement. However, the Fourth DE Holdings LLC Agreement was the last version filed with and approved by the Commission. See Notices, supra note 5, at 76424 n.71 and 76488 n.71.

<sup>63</sup> See Current DE Holdings LLC Agreement, Article I, Section 1.1 (defining “Person”).

<sup>64</sup> See id. at Article I, Section 1.1 (defining “Related Persons”). See Notices, supra note 5, at 76416 n.17 and 76480 n.17.

<sup>65</sup> Percentage Interest means, with respect to a LLC Member, the ratio of the number of Units held by the LLC Member to the total of all of the issued and outstanding Units, expressed as a percentage. For purposes of the Current DE Holdings Voting Limitation and the Current DE Holdings Ownership Limitation, Percentage Interest also includes Units owned, directly or indirectly, of record or beneficially, by a Person, either alone or together with its Related Persons. See Current DE Holdings LLC Agreement, Article I, Section I, Section 1.1 (also defining “Units” and “Person”).

<sup>66</sup> See Current DE Holdings LLC Agreement, Article XII, Section 12.1(a).

(except with respect to Exchange members and their Related Persons) pursuant to an amendment to the Current DE Holdings LLC Agreement adopted by the board of managers of DE Holdings, if, in connection with the adoption of such amendment, the board of managers adopts a resolution stating that it is the determination of such board that such amendment: (1) Will not impair the ability of each DE Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder; (2) is otherwise in the best interests of DE Holdings, its LLC Members, and the DE Exchanges; (3) will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and (4) shall not be effective until it is filed with and approved by the Commission.<sup>67</sup>

In connection with the Combination, the Current DE Holdings Operating Agreement will be amended and restated to (among other changes): (1) remove the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation and (2) specify that the sole stockholder of DE Holdings will be New BGM. In addition, as noted below, the New BGM Charter, which will become effective contemporaneously with the Closing, will contain ownership and voting limitation provisions that are substantively the same as the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation.

Because the Current DE Holdings LLC Agreement will be amended to eliminate the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation contemporaneously with the Combination, New BGM's acquisition of ownership and voting rights in DE Holdings upon Closing would not cause New BGM to contravene the Current DE

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<sup>67</sup> See Current DE Holdings LLC Agreement, Article XII, Section 12.1(b). In granting such a waiver, the DE Holdings board of directors has the discretion to impose on the person and its Related Persons, such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each DE Exchange. Id.

Holdings Ownership Limitation or the Current DE Holdings Voting Limitation. Therefore, in this instance, although New BGM will possess ownership and voting rights in excess of the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation, no waiver of these provisions is necessary.

Nevertheless, because the Combination will result in a change of ownership of DE Holdings (in that New BGM will become the sole stockholder of DE Holdings), the DE Exchanges and the board of managers of DE Holdings represented that it was appropriate for the board of managers of DE Holdings to adopt the Resolutions, which set forth certain determinations with respect to New BGM and the Combination similar to those that would have been necessary to waive the Current DE Holdings Ownership Limitation and Current DE Holdings Voting Limitation.

Specifically, the board of managers of DE Holdings made the determination that the consummation of the Combination: (1) Will not impair the ability of each DE Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, is in the best interests of DE Holdings, its LLC Members and the DE Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; (2) the acquisition of the proposed share ownership and the acquisition or exercise of the proposed voting rights by New BGM in DE Holdings will not impair the ability of each DE Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of the DE Holdings, its LLC Members and the DE Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; (3) no party to the Combination, including New BGM, nor any of its

Related Persons, is subject to “statutory disqualification” within the meaning of Section 3(a)(39) of the Act;<sup>68</sup> and (4) neither New BGM, nor any of its Related Persons (excluding BATS Trading, which is a Member of the DE Exchanges),<sup>69</sup> is a Member.<sup>70</sup>

The Commission believes that it is consistent with the Act to allow New BGM to wholly-own and vote all of the outstanding units of DE Holdings. The Commission notes that, as the new top-level holding company for the combined businesses, New BGM will have ownership divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings.<sup>71</sup> According to the DE Exchanges, of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own 10 percent or greater.<sup>72</sup> The Commission also notes that, while the Current DE Holdings Ownership Limitation and Current DE Holdings Voting Limitation will no longer be in the New DE Holdings LLC Agreement, the New DE Holdings LLC Agreement will specify that DE Holdings’ sole stockholder will be New BGM, and the New BGM Charter will contain

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<sup>68</sup> 15 U.S.C. 78c(a)(39).

<sup>69</sup> As noted below, BATS Trading is a routing broker-dealer and a Member that is affiliated with the DE Exchanges. As part of the proposed rule changes, the DE Exchanges seek for the Commission to approve BATS Trading’s affiliation with the DE Exchanges pursuant to Rules 2.10 and 2.12 of each DE Exchange.

<sup>70</sup> The Resolutions also contain a determination that the execution and delivery of the merger agreement by New BGM constituted notice of New BGM’s intention to acquire ownership and voting rights in excess of the Current DE Holdings Ownership Limitation and Current DE Holdings Voting Limitation, respectively, in writing and not less than 45 days before the Closing. See Current DE Holdings Operating Agreement, Article XII, Section 12.1(d).

<sup>71</sup> See Notices, supra note 5, at 76418 and 76482.

<sup>72</sup> See id.



substantively identical ownership and voting limitation provisions.<sup>73</sup> Further, as discussed above, New BGM has included in its corporate documents certain provisions designed to maintain the independence of each DE Exchange’s regulatory functions from New BGM, DE Holdings and DEI.<sup>74</sup> Accordingly, the Commission does not believe that the Combination will impair the ability of either DE Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder.

4. Miscellaneous Changes to the Corporate Governance Documents of DE Holdings, DEI and the DE Exchanges

As noted above the Current DE Holdings Operating Agreement will be amended and restated to (among other changes): (1) Remove the Current DE Holdings Ownership Limitation and the Current DE Holdings Voting Limitation and (2) specify that the sole stockholder of DE Holdings will be New BGM.<sup>75</sup> As described in more detail in the Notices, the other proposed changes to the Current DE Holdings Operating Agreement are to reflect DE Holdings’ proposed new status as an intermediate holding company and to delete, or replace as appropriate, various other provisions that are applicable to a limited liability company with multiple LLC Members, but not to one with a sole LLC Member.<sup>76</sup>

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<sup>73</sup> See proposed New DE Holdings LLC Agreement and proposed New BGM Charter, Article FIFTH.

<sup>74</sup> See proposed New BGM Bylaws, Article XIV, proposed New DE Holdings LLC Agreement Articles X and XI; and proposed DEI Bylaws Articles V and VII.

<sup>75</sup> See supra Section II.B.3.

<sup>76</sup> See Notices, supra note 5, at 76425-26 and 76489-90 (discussing changes to provisions that were adopted in light of DE Holdings being owned by multiple LLC Members; replacing provisions containing procedures for transfer of units with a provision prohibiting any transfers; replacing various board of managers governance provisions with provisions that provide that DE Holdings will be managed by its sole LLC Member;

The DE Exchanges also propose various changes to the DEI Certificate of Incorporation and the DEI Bylaws, as described in more detail in the Notices.<sup>77</sup> For example, the DE Exchanges propose to amend the DEI Certificate of Incorporation to delete certain provisions that describe circumstances that require the majority or supermajority vote of the LLC Members or the board of managers of DE Holdings. According to the DE Exchanges, these provisions will no longer be necessary because, upon Closing, DE Holdings will no longer have a board of managers and will only have one LLC Member.<sup>78</sup> The proposed rule change also modifies the language in the amendment provision in the DEI Certificate of Incorporation and the DEI Bylaws to conform them to the procedures in the New BGM Bylaws.<sup>79</sup> Further, the DE Exchanges propose to delete references to “Owner Directors”<sup>80</sup> in the DEI Bylaws because the DE Exchanges propose to eliminate that category of directors from their board.

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and replacing provisions governing distributions and calculations of profit and loss with more simplified provisions).

<sup>77</sup> See Notices, supra note 5, at 76426-27 and 76490-91.

<sup>78</sup> See Notices, supra note 5, at 76427 and 76491.

<sup>79</sup> Id. See also proposed DEI Certificate of Incorporation, Article SEVENTH, para. 4 (“For so long as the Corporation shall control, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of this Certificate of Incorporation shall be effective, those changes shall be submitted to the board of directors of each Exchange Subsidiary and if the same must be filed with, or filed with and approved by, the Securities and Exchange Commission (the “SEC”) before the changes may be effective under Section 19 of the Exchange Act and the rules promulgated thereunder by the SEC or otherwise, then the proposed changes to this Certificate of Incorporation of this Corporation shall not be effective until filed with, or filed with and approved by, the SEC, as the case may be.”); and proposed DEI Bylaws, Article VI, para. 6.4 (proposing similar changes to the amendment provision).

<sup>80</sup> See Notices, supra note 5 at 76427 and 76491 (defining “Owner Directors”).

The DE Exchanges also propose to delete a provision in the DEI Bylaws relating to the handling of regulatory funds in the possession of DEI.<sup>81</sup> The DE Exchanges note that, pursuant to the rules of the DE Exchanges, DEI is not permitted to come into possession of regulatory funds and therefore retaining that provision in the corporate documents is unnecessary and potentially confusing.<sup>82</sup> The DE Exchanges also propose various other minor changes to conform the DEI corporate governance documents to those of the BATS Exchanges and other ministerial changes, as described in more detail in the Notices.<sup>83</sup>

In addition, as described in more detail in the Notices, each DE Exchange proposes to revise its DE Exchange Certificate of Incorporation and DE Exchange Bylaws to conform them to certificates of incorporation and bylaws of the BATS Exchanges.<sup>84</sup> The DE Exchanges stated that they believed that it was important to have a consistent, uniform approach to corporate governance for all of the Exchanges held under New BGM.<sup>85</sup>

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<sup>81</sup> See Notices, supra note 5, at 76428 and 76492.

<sup>82</sup> Id. Specifically, the DE Exchanges Bylaws each prohibit the DE Exchanges from distributing any regulatory funds to DEI and require that such funds only be applied to fund the legal and regulatory operations of the DE Exchanges or pay restitution and disgorgement of funds intended for customers. See DE Exchange Bylaws, Article X, Section 4.

<sup>83</sup> See Notices, supra note 5, at 76426-29 and 76490-93.

<sup>84</sup> See Notices, supra note 5, at 76429-39 and 76493-503 (describing in detail changes to the DE Exchanges corporate documents to unify the governance and corporate practices of all four Exchanges).

<sup>85</sup> The DE Exchanges are proposing several amendments to the DE Exchange Bylaws that reflect changes that the BATS Exchanges proposed to make to their bylaws as a result of the Combination. The BATS Exchanges described these proposed revisions in the BATS Exchanges' companion rule filings related to the Combination. See Securities Exchange Act Release Nos. 71023 (December 6, 2013), 78 FR 75607 (December 12, 2013) (SR-BATS-059) and 71024 (December 6, 2013), 78 FR 75585 (December 12, 2013) (SR-BYX-2013-039). See also Notices, supra note 5, at 76429 and 76493.

The Commission finds that these provisions are consistent with the Act. In large part, the proposed changes discussed in this section conform the corporate governance documents of DE Holdings, DEI and the DE Exchanges with provisions previously approved and in BATS' corporate documents and rules prior to the Combination. Other proposed changes correspond to provisions in BATS' corporate documents and rules approved by the Commission as part of the Combination.<sup>86</sup> The remaining changes update the governing documents of DE Holdings, DEI and the DE Exchanges to reflect the new corporate structure and other ministerial changes.

C. Affiliation between BATS Exchanges and DE Exchanges

Rule 2.3 of each of the DE Exchanges generally provides that, in order to be eligible for membership in a DE Exchange, a registered broker or dealer is required to be a member of another national securities association or national securities exchange. As discussed above, as a result of the Combination, the BATS Exchanges will become affiliated with the DE Exchanges. The Exchange believes that it is appropriate to limit membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the DE Exchanges. Therefore, the DE Exchanges propose to amend Rule 2.3 of each of the DE Exchanges to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than or in addition to BATS, BYX, EDGA or EDGX.

The Commission notes that the proposed changes to Rule 2.3 of each of the DE Exchanges extends the membership eligibility criteria in a way that is consistent with the current Rule 2.3 of each of the BATS Exchanges, taking into account the each DE Exchange's affiliation

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<sup>86</sup> See BATS Exchanges Approval Order, supra note 4.

with each other and the DE Exchanges new affiliation with the BATS Exchanges after the Closing.

D. Affiliation with BATS Trading

As discussed above, as a result of the Combination, New BGM will, indirectly, wholly own the BATS Exchanges, the DE Exchanges, BATS Trading and DE Route. BATS Trading is a registered broker-dealer and a member of Financial Industry Regulation Authority. BATS Trading is also a member of each of the BATS Exchanges and the DE Exchanges.<sup>87</sup>

Rule 2.10 of each DE Exchange generally provides that, without the prior approval of the Commission, (1) each DE Exchange or any entity with which each DE Exchange is affiliated (as defined in Rule 12b-2 under the Act), may not directly or indirectly acquire or maintain an ownership interest in a Member of each DE Exchange, and (2) a Member of each DE Exchange may not be or become an affiliate of the DE Exchange, or an affiliate of any affiliate of the DE Exchanges. Rule 2.10 of each of the DE Exchanges, however, provides that nothing in Rule 2.10 shall prohibit a DE Exchange from being an affiliate of its member, DE Route, or the other DE Exchange.<sup>88</sup> The DE Exchanges note that the purpose of Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the DE Exchanges or their affiliates having an ownership interest in a Member, particularly with respect to the Exchanges' obligation under Section 19(g) of the Act<sup>89</sup> to enforce its Members' compliance with the Act, the Commission's rules thereunder, and DE Exchanges' Rules.<sup>90</sup>

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<sup>87</sup> See Notices, supra note 5, at 76440 and 76504.

<sup>88</sup> See infra note 98 and accompanying text.

<sup>89</sup> 15 U.S.C. 78s(g).

<sup>90</sup> See Notices, supra note 5, at 76440 and 76504.

BATS Trading is currently a Member of each DE Exchange. The DE Exchanges proposed to become affiliated with BATS Trading, and BATS Trading provides certain routing services to the DE Exchanges. Specifically, the DE Exchanges proposed to receive through BATS Trading orders routed inbound to the DE Exchanges from each of the BATS Exchanges, both of which will also be affiliates of the DE Exchanges as a result of the Combination. Accordingly, the DE Exchanges have asked the Commission to approve an amendment to Rule 2.10 that will permit the affiliation between each of the DE Exchanges and their Member, BATS Trading.<sup>91</sup>

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange,

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<sup>91</sup> The current Rule 2.10 of each of the DE Exchanges states that nothing in the rule shall prohibit each DE Exchange from being an affiliate of DE Route or the other DE Exchange. Because the DE Exchanges will be affiliated with BATS Trading and the BATS Exchanges, as well as DE Route, after Closing, the DE Exchanges propose to expand this provision to specifically permit the DE Exchanges' affiliation with BATS Trading and the BATS Exchanges.

The DE Exchanges also propose to make several changes to Rule 2.10 of each DE Exchange to reflect the proposed change in the corporate structure of the DE Exchanges after Closing. Specifically, Rule 2.10 currently states that nothing in Rule 2.10 shall prohibit a Member or its affiliate from acquiring or holding an equity interest in DE Holdings that is permitted by the DE Holdings Ownership and Voting Limitations. Furthermore, Rule 2.10 currently states, in relevant part, that nothing in Rule 2.10 shall prohibit a Member from being or becoming an affiliate of the DE Exchanges, or an affiliate of any affiliate of the DE Exchanges, solely by reason of such Member or any officer, director, manager, managing member, partner or affiliate of such Member being or becoming a director serving on the board of directors of DE Holdings. Because New BGM will replace DE Holdings as the ultimate parent company of the DE Exchanges after Closing, New BGM's governing documents, as opposed to the revised DE Holdings governing documents, set forth the relevant ownership and voting limitations, and provide for Member representation on the New BGM board of directors. Therefore, the DE Exchanges propose to replace the references to DE Holdings and its governing documents in Rule 2.10 with references to New BGM and its governing documents. See Notices, supra note 5, at 76440 and 76504.

particularly where a member is routing orders to such affiliated exchange,<sup>92</sup> each DE Exchange previously implemented limitations and conditions to the affiliation between each DE Exchange and DE Route, also an affiliated member, to permit each DE Exchange to accept inbound orders that DE Route routes in its capacity as a facility of an affiliated exchange (EDGA or EDGX as applicable).<sup>93</sup> Again recognizing the Commission's concerns, the DE Exchanges have now proposed that BATS Trading operate as an affiliated inbound router subject to substantially similar limitations and conditions.<sup>94</sup>

Specifically, the DE Exchanges proposed that BATS Trading, operating as a facility of the BATS Exchanges, provide routing services from each of the BATS Exchanges to each DE Exchange, subject to the following conditions and limitations set forth in the proposed Rule 2.12(a) of each DE Exchange:<sup>95</sup>

- Each DE Exchange would enter into (1) a plan pursuant to Rule 17d-2 under the Exchange Act with a non-affiliated SRO to relieve each DE Exchange of

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<sup>92</sup> See e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006). See also Securities Exchange Act Release No. 57648 (April 11, 2008), 73 FR 20981 (April 17, 2008).

<sup>93</sup> See Rule 2.12 of each of the DE Exchanges. See also Securities Exchange Act Release No. 61698, (March 12, 2010), 75 FR 13151 (March 18, 2010) (approving registration application of EDGA and EDGX and approving conditions and limitations which allowed EDGA and EDGX to receive inbound routes of orders by DE Route in its capacity as an order routing facility of EDGX and EDGA on a twelve month pilot). The Commission later approved proposals to make the pilots permanent. See Securities Exchange Act Release No. 69870 (June 27, 2013), 78 FR 40225 (July 3, 2013) (EDGX-2013-17); and Securities Exchange Act Release No. 69871 (June 27, 2013), 78 FR 40253 (July 3, 2013) (EDGA-2013-13).

<sup>94</sup> See Notices, *supra* note 5, at 76439 and 76503.

<sup>95</sup> See Rule 2.12 of each of the DE Exchanges. See also Notices, *supra* note 5, at 76439 and 76503. Additionally, Rule 2.12(b) will require that BATS Trading operate as an outbound router on behalf of each of the BATS Exchanges in accordance with the rules of each BATS Exchange.

regulatory responsibilities for BATS Trading with respect to rules that are common rules between each DE Exchange and the non-affiliated SRO, and (2) a regulatory services contract with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique rules of each DE Exchange.

- The regulatory services contract would require the DE Exchanges to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively “Exceptions”) in which BATS Trading is identified as a participant that has potentially violated the rules of the DE Exchanges or Commission rules, and would require that the non-affiliated SRO provide a report, at least quarterly, to the DE Exchanges quantifying all such exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters in which BATS Trading is identified as a participant that has potentially violated the rules of the DE Exchanges or the Commission.
- Each DE Exchange, on behalf of the holding company indirectly owning the DE Exchanges, would establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system on the basis of non-public information obtained as a result of its affiliation with the DE Exchanges, until such information is available generally to similarly situated members of the DE Exchanges in connection with the provision of inbound order routing to the DE Exchanges.

In addition, in the Notices, the DE Exchanges also stated that the provision of such routing services also is conditioned on the requirement that each DE Exchange may furnish to BATS



Trading the same information and on the same terms as the Exchange makes available in the normal course of business to other uses.<sup>96</sup>

Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit BATS Trading to be affiliated with the DE Exchanges and to provide inbound routing to the DE Exchanges, subject to the conditions described above.

The DE Exchanges have proposed four conditions applicable to BATS Trading's inbound routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO oversight of BATS Trading,<sup>97</sup> combined with the non-affiliated SRO's monitoring of BATS Trading's compliance with the equity trading rules and quarterly reporting to each DE Exchange, will help to protect the independence of each DE Exchange's regulatory responsibilities with respect to BATS Trading. The Commission also believes that the requirement that each DE Exchange establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the DE Exchanges, until such information is available generally to similarly situated members of the DE Exchanges, is reasonably designed to ensure that BATS

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<sup>96</sup> See Notices, supra note 5, at 76439 and 76503.

<sup>97</sup> The oversight will be accomplished through the Rule 17d-2 agreement and the regulatory contract.

Trading cannot misuse any information advantage it may have because of its affiliation with the DE Exchanges.

Further, the Commission notes that the proposed conditions for the operation of BATS Trading as an affiliated inbound router on behalf of each DE Exchange are consistent with conditions the Commission has approved for other exchanges.<sup>98</sup> The Commission therefore finds the proposed operation of BATS Trading as an affiliated inbound router of the DE Exchanges is consistent with the Act.

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<sup>98</sup> See, e.g., Securities Exchange Act Release Nos. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (order approving the exchange registration of BATS Y-Exchange, Inc.), and 65456 (September 30, 2011), 76 FR 62118 (October 6, 2011) (order approving a proposal by NYSE Arca, Inc. (“NYSE Arca”) to make permanent the pilot program that permits NYSE Arca to accept inbound orders routed by its affiliated broker-dealer). They are also consistent with the conditions and limitations on inbound routing to the DE Exchange by its affiliate DE Route. See supra note 96 and accompanying text.

### III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>99</sup> that the proposed rule changes (SR-EDGA-2013-34 and SR-EDGX-2013-43), as amended, are approved. For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>100</sup>

Kevin M. O'Neill,  
Deputy Secretary.

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<sup>99</sup> 15 U.S.C. 78s(b)(2).

<sup>100</sup> 17 CFR 200.30-3(a)(12).